Jan 26 2000

No. 99-409

Supreme Court, U.S.
FILED
JAN 26 2000
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IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

UNION PLANTERS BANK, N.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Does Section 506(c) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), provide unpaid administrative claimants of a bankruptcy estate with a personal right to recover for their exclusive benefit the unpaid amount of their administrative expense claims from the collateral of a secured creditor?

CORPORATE DISCLOSURE STATEMENT

Respondent Union Planters Bank, N.A., is the successor in interest due to merger, effective as of October 9, 1998, to Magna Bank, N.A. Union Planters Bank, N.A. is a wholly-owned subsidiary of Union Planters Corporation, a publicly-traded corporation. No publicly held company owns 10% or more of Union Planters Corporation's stock.

Although *Brief for Petitioner* and the decision below refer to Respondent as "Magna," Respondent is referred to herein as "Union Planters."

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124 Cong. Rec. S17406 (daily ed. October 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6505 (statement of Sen. DeConcini)	38
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K. Klee, *Legislative History of the New Bankruptcy Code*, 54 Am. Bankr. L.J. 275 (1980)	39
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L. Snider and K. Noble, *Standing to Surcharge the Secured Creditor: Policy, Plain Meaning, and Payment Under Section 506(c) of the Bankruptcy Code*, 5 J. Bankr. L. & Prac. 301 (March/April 1996)	18

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UNION PLANTERS BANK, N.A.,
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On Writ of Certiorari to the United States Coourt of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This matter arises out of the bankruptcy proceedings of Hen House Interstate, Inc. (the "Debtor"), a closely-held corporation that at one time owned and/or operated eighteen restaurants located throughout the Midwest, as well as an outdoor advertising firm based in Muncie, Indiana. App. 38a.

The Debtor's bankruptcy proceedings were commenced on September 5, 1991, when the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court"). App. 253a. At the time it filed its bankruptcy petition, the Debtor hoped to reorganize its business under the provisions of Chapter 11 and ultimately emerge from bank-

ruptcy. App. 254a. As a "Chapter 11 debtor-in-possession" under the provisions of Bankruptcy Code Section 1107, the Debtor initially was allowed to remain in possession of its assets and continue managing its financial affairs. App. 37a.

Prior to the commencement of the Debtor's bankruptcy proceedings, Union Planters[1] provided financing to the Debtor, which was secured by a perfected security interest in essentially all of the Debtor's real and personal property. App. 181a-191a. At the time of the Debtor's bankruptcy filing, the outstanding indebtedness owing by the Debtor to Union Planters with respect to the foregoing financing was in excess of $4,000,000. App. 190a-191a.

Under the provisions of Bankruptcy Code Section 363 (c)(2), a Chapter 11 debtor-in-possession may ordinarily not spend or otherwise use any "cash collateral"—that is, funds in which a creditor has a security interest—unless it obtains the consent of the secured creditor and/or authorization from the bankruptcy court. Consequently, immediately upon the filing of its bankruptcy petition, the Debtor did not have authority to use any cash or other funds subject to Union Planters' security interest. App. 43a-44a. Following the commencement of the bankruptcy proceeding, however, Union Planters and the Debtor negotiated the terms of a Post-Petition Loan Agreement (the "Post-Petition Loan Agreement"), pursuant to which

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[1] As noted above, Union Planters is the successor by merger to Magna Bank, N.A. ("Magna"). Magna, in turn, was the successor in interest to the rights, claims and interests of Landmark Bank of Illinois ("Landmark") under various financing and loan documents by and between the Debtor and Landmark. For purposes of convenience, reference herein is made to Union Planters, notwithstanding that certain facts may pertain to Landmark prior to its acquisition by Magna and/or to Magna prior to its merger into Union Planters.

Union Planters agreed (subject to certain terms and conditions) that during the course of the Debtor's Chapter 11 proceeding, it would not only allow the Debtor to use its cash collateral but it would also provide the Debtor with an additional $300,000.00 in "post-petition financing." App. 48a-93a.

After granting the Debtor "interim" authority to obtain limited financing under the Post-Petition Loan Agreement, the Bankruptcy Court entered a *Final Order Authorizing Debtor to Obtain Post-Petition Secured Credit, Granting Senior Liens, and Administrative Priority Expense, Modifying Automatic Stay, Providing Adequate Protection and Authorizing Agreements with Landmark Bank of Illinois* on October 25, 1991 (the "Final DIP Order"), pursuant to which it gave final aproval and authorization for the Debtor to enter into the Post-Petition Loan Agreement. App. 178a-206a. Under the terms of the Final DIP Order, the Bankruptcy Court granted Union Planters a first priority senior lien and security interest in all the Debtor's then owned or thereafter acquired real and personal property. App. 196a. In addition, under paragraph 33 of the Final DIP Order, the Bankruptcy Court ordered that:

> [e]xcept for [a $10,000.00 professional fees] Carve Out, no expenses of administration of Debtor's Chapter 11 case or any future proceeding which may develop out of such case, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against [Union Planters] or [its] Collateral, whether pursuant to § 506(c) of the Bankruptcy Code or otherwise, without the prior written consent of [Union Planters], and no such consent shall ever be implied from any other action, inaction, or acquiescence.

App. 201a.

After the entry of the Final DIP Order, Union Planters advanced the entire $300,000.00 in post-petition financing to the Debtor and allowed the Debtor to use its cash collateral. App. 206a. Even with this additional financing, however, the Debtor was unable to successfully reorganize. Consequently, on January 23, 1993, the Debtor's Chapter 11 case was converted to a Chapter 7 liquidation proceeding. App. 251a. Shortly thereafter, Robert J. Blackwell (the "Trustee") was appointed as the trustee of the Debtor's Chapter 7 bankruptcy estate and charged with the responsibility of liquidating the assets of the estate and distributing the resulting proceeds to creditors in accordance with the provisions of Chapter 7 of the Bankruptcy Code. App. 251a.

As a result of the Debtor's failure to successfully reorganize, Union Planters sustained a loss of approximately $1.5 million in unpaid principal, plus additional amounts for unpaid interest and attorneys fees and expenses owing by the Debtor. App. 254a.

During the course of Debtor's Chapter 11 proceeding, Petitioner Hartford Underwriters Insurance Company ("Hartford") provided workers' compensation insurance coverage to the Debtor. App. 253a. Under the terms of the insurance policy issued by Hartford to the Debtor (the "Policy"), the Debtor was responsible for making monthly premium payments to Hartford. App. 224a-226a. Although the Debtor repeatedly failed to make these monthly premiums to Hartford throughout the Chapter 11 proceeding, Hartford did not make any attempt during that time to cancel or terminate the Policy (even though it could have done so under the terms of the Policy). App. 224a-227a. Consequently, by the time the Debtor's bankruptcy proceedings were converted to Chapter 7, Hartford was owed in excess of $50,000 in unpaid premiums by the Debtor. App. 253a.

Following the conversion of the Debtor's bankruptcy case to a Chapter 7 proceeding, Hartford filed an *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c)* (the "Application") with the Bankruptcy Court. App. 207a-211a. Pursuant to this Application Hartford not only requested that it be awarded an administrative priority claim under Bankruptcy Code Section 503(a) for the unpaid premiums owing by the Debtor, but also that it be allowed to recover these premiums from Union Planters' collateral under the provisions of Bankruptcy Code Section 506(c). As Hartford now acknowledges, prior to the filing of this Application, it never requested nor made demand upon the Trustee to pursue the recovery of these premiums or any other amounts from Union Planters' collateral. *Brief for Petitioner*, p. 5, n.4.[2]

Union Planters objected to Hartford's Application, contending, *inter alia*, that because Hartford was not a "trustee", it was not entitled to pursue a right of recovery under Bankruptcy Code Section 506(c). App. 212a-214a. Ruling in favor of Hartford, the Bankruptcy Court stated that it could not consider the latter issue because it was required to follow the holding in *United States, Internal*

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[2] Citing to *United States, Internal Revenue Service v. Boatmen's First National Bank of Kansas City*, 5 F.3d 1157 (8th Cir. 1993), Hartford asserts that it "did not request the trustee to pursue its claim under section 506(c) because the law in the Eighth Circuit *as it existed at that time* permitted administrative claimants to pursue such claims on their own behalf." *Brief for Petitioner*, p. 5, n.4 (emphasis added). However, the *Boatmen's* decision was not issued until September 23, 1993—more than a month and a half after Hartford filed its Application with the Bankruptcy Court. Prior to the *Boatmen's* decision, there was no controlling precedent in the Eighth Circuit on this issue and this issue had been raised and was being contested in the bankruptcy case below at the time the *Boatmen's* decision was rendered.

Revenue Service v. Boatmen's First National Bank of Kansas City, 5 F.3d 1157, 1159 (8th Cir. 1993), wherein a divided panel of the Eighth Circuit Court of Appeals held that third party claimants may pursue a private right of recovery under Bankruptcy Code Section 506(c). App. 255a-256a. Following the Bankruptcy Court's decision, Union Planters appealed to United States District Court for the Eastern District of Missouri (the "District Court"), which similarly stated that it was required to follow the *Boatmen's* holding. App. 273a.

Union Planters then appealed to the Eighth Circuit Court of Appeals, where a three member panel stated that it was also required to follow the *Boatmen's* holding because "only the court en banc can overrule another panel's decision." App. 290a (*quoting Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996)).

Upon Union Planters' motion for rehearing, however, the Eighth Circuit Court of Appeals, sitting *en banc*, reversed the decisions below. In doing so, the Circuit Court expressly overruled the *Boatmen's* decision and held that under its plain and unambiguous terms, Bankruptcy Code Section 506(c) does not provide for a right of recovery in favor of third party claimants such as Hartford. App. 302a-305a.

Following this decision, Hartford filed a Petition for Certiorari with this Court, which was granted on November 8, 1999.

SUMMARY OF ARGUMENT

Under its plain and unambiguous terms, Bankruptcy Code Section 506(c) only creates a right of recovery in favor of the "trustee."[3] Given the certainty and clarity

[3] Pursuant to the provisions of Bankruptcy Code Section 1107, a debtor-in-possesssion in a Chapter 11 proceeding is expressly given the rights and powers of a trustee and, thus, is clearly entitled to pursue a surcharge claim on behalf of the bankruptcy estate under Bankruptcy Code Section 506(c). *See* 11 U.S.C. § 1107. In contrast, there is no provision in the Bankruptcy Code expressly authorizing third party claimants to exercise the trustee's powers under Section 506(c). For ease of reference and in recognition that the present controversy did not arise until after the Debtor's Chapter 11 proceedings were converted to Chapter 7, the right of surcharge under Section 506(c) will generally be referred to herein as a right existing in favor of the trustee—even though it is clear that pursuant to the provisions of Bankruptcy Code Section 1107, that right also exists in favor of a Chapter 11 debtor-in-possession.

of the statutory text, the only way to find authority for permitting a third party claimant such as Hartford to pursue a right of recovery under Section 506(c) is to add language to the statute that Congress clearly chose not to include.

As is the case with the other rights and powers created in favor of the trustee, when a trustee pursues a right of recovery under Bankruptcy Code Section 506(c), she does so for the collective benefit of all creditors. Thus, any amounts recovered by a trustee under Section 506(c) become part of the bankruptcy estate and are distributed in accordance with the Bankruptcy Code's priority and distribution provisions.

In contrast, Hartford seeks to proceed under Section 506(c) solely on its own behalf rather than on behalf of the bankruptcy estate. Thus, if Hartford is permitted to recover under Section 506(c), the amounts recovered will not become part of the bankruptcy estate or otherwise be shared with other unpaid administrative claimants. Instead, Hartford will retain these amounts for its own exclusive benefit.

Not only is such a result completely incompatible with bankruptcy's function as a collective debt collection procedure, it also would severely undermine the Bankruptcy Code's carefully crafted priority and distribution provisions.

While Hartford maintains that it is necessary to allow third party claimants such as itself to proceed under

Bankruptcy Section 506(c) because trustees often lack sufficient incentive to do so, Hartford disregards the fact that trustees have a fiduciary duty to maximize the assets of the bankruptcy estate and, thus, are legally obligated to pursue those surcharge recoveries that they believe are meritorious and will ultimately benefit the bankruptcy estate. Moreover, notwithstanding its repeated complaints about the alleged lack of incentive on the part of trustees, Hartford concedes that in the instant case it never requested that the Trustee attempt to recover the amounts presently at issue.

Similarly, while Hartford voices concern about the alleged "windfall" secured creditors will realize if third party claimants are not allowed to pursue private rights of recovery under Section 506(c), it is apparent there are many available means by which parties in Hartford's position can protect themselves against the risks of nonpayment. Having failed to avail itself of any of these protections, Hartford cannot now recast Section 506(c) as creating a private federal cause of action pursuant to which it is entitled to hold Union Planters liable for the unpaid insurance premiums owed by the Debtor.

In any event, if Hartford believes that there are policy reasons favoring allowance of private surcharge rights against secured creditors, it should address these concerns before Congress rather than ask this Court to disregard Bankruptcy Code Section 506(c)'s clear and unambiguous language.

Because the language of Bankruptcy Code Section 506(c) is plain and unambiguous, it is neither necessary nor appropriate to consider the statute's legislative history. Nonetheless, because it repeatedly and exclusively refers to Section 506(c) as a remedy existing solely in favor of the trustee or debtor-in-possession, the legislative history

to Section 506(c) merely reinforces the propriety of construing the statute in accordance with its plain meaning.

Confronted by Section 506(c)'s plain and unambiguous language—and a legislative history that reinforces that plain and unambiguous language—Hartford seeks to find support for its position in "pre-Code practice"—that is, the practice that existed prior to the adoption of the Bankruptcy Code in 1978. As this Court has repeatedly recognized, it is not appropriate to consider pre-Code practice in situations such as the present where both the statute and legislative history are clear and unambiguous. Nonetheless, even if one were to consider pre-Code practice relating to surcharge recovery issues, it is evident that far from evidencing a clearly defined and well-established rule of law, pre-Code practice, at the very most, implicated certain broad and loosely defined concepts that have little relevance to and provide no meaningful insight into the workings of the modern day Bankruptcy Code.

Finally, Debtor mistakenly attempts to rely on this Court's jurisprudence regarding the doctrine of standing. Standing, in the technical and traditional sense, concerns whether a party has a sufficient stake in the outcome of a case so that it can be relied upon to present a justifiable case or controversy. In contrast, the issue in this case is whether Hartford has a right of recovery under Bankruptcy Code Section 506(c). Thus, Hartford may be entirely correct that if Section 506(c) created a private right of recovery in favor of administrative claimants, it would have standing to assert that right. Nevertheless, as is evident from the statute's plain language, its legislative history and the overall structure and purpose of the Bankruptcy Code, no such right exists in the first instance.

ARGUMENT

I. UNDER ITS CLEAR AND UNAMBIGUOUS TERMS, BANKRUPTCY CODE SECTION 506(c) DOES NOT GIVE UNPAID ADMINISTRATIVE CLAIMANTS A PRIVATE RIGHT OF RECOVERY AGAINST THE COLLATERAL OF A SECURED CREDITOR

A. The Language of the Statute Is Plain and Unambiguous

The proper construction of any statute must begin "with the language of the statute itself." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989). If the provisions of the statute are clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Id.* Indeed, this is a fundamental precept to which this Court has consistently adhered in construing the provisions of the Bankruptcy Code. *See, e.g., Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191 (1993); *Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242, 2248 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200 (1991).

Looking to Bankruptcy Code Section 506(c), the plain and unambiguous language of the statute does not create a right of recovery in favor of any party other than "the trustee." *See, e.g., In re Hen House Interstate, Inc.*, 177 F.3d 719, 723 (8th Cir. 1999) (*en banc*) ("The natural reading of § 506(c) entitles only the trustee to seek to surcharge property securing the claim of an allowed secured creditor under that section."); *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994) (language of Section 506(c) is "clear and unambiguous."). Thus, "[t]here is no reference in the statute to any 'affected entity', 'aggrieved entity', or other parties." *Williams v. Bank One Cleveland, N.A. (In re Dyac Corporation)*, 164 B.R. 574, 579 (Bankr. N.D. Ohio 1994);

Boyd v. Dock's Corner Associates (Matter of Great Northern Forest), 135 B.R. 46, 65 (Bankr. W.D. Mich. 1991).

Instead, Section 506(c) singularly and exclusively identifies the trustee as the proper party to pursue the right of recovery created under the subsection. *See Peidmont Farm Credit, ACA v. G & M Milling Company (In re Caldwell)*, 147 B.R. 119, 120 (M.D.N.C. 1992) ("the express language is clear and unambiguous—that 'trustee' does in fact mean 'trustee.' "). Indeed, this is a point acknowledged even by those courts that have nonetheless permitted third parties to pursue individual recoveries under Section 506(c). *See, e.g., Precision Steel Shearing, Inc. v. Fremont Financial Corporation (In re Visual Industries, Inc.)*, 57 F.3d 321, 325 (1st Cir. 1995) (allowing administrative claimant to pursue individual recovery under Section 506(c) "[a]lthough § 506(c) in terms only refers to recovery by the trustee"); *North County Jeep and Renault, Inc. v. General Electric Capital Corporation (In re Palomar Truck Corporation)*, 951 F.2d 229, 231-2 (9th Cir. 1991) (permitting administrative claimant to pursue individual recovery under Section 506(c) but acknowledging "the seemingly categorical statutory language confining the remedy to trustees"); *New Orleans Public Service, Inc. v. First Federal Savings and Loan Association of Warner Robins, Georgia (Matter of Delta Towers, Ltd.)*, 924 F.2d 74, 76 (5th Cir. 1991) (permitting administrative claimant to pursue individual recovery under Section 506(c) notwithstanding the statute's "seemingly unambiguous language.").

There is nothing in the structure or the syntax of Section 506(c) that in any way suggests that Congress's singular selection of the word "trustee" was unintentional or that its omission of any other parties was inadvertent. On the contrary, the trustee is the sole and exclusive subject upon

which the entire remaining text of Section 506(c) is predicated.

Given the clarity and deliberateness of the relevant text, it is evident that the only way to find authority to allow third party claimants such as Hartford to pursue individual recoveries under Section 506(c) is "to begin inserting additional words and clauses that Congress has not seen fit to put in the [Bankruptcy] Code." *Central States, Southeast Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 503 (Bankr. W.D.Mich. 1988). This, of course, would constitute a direct usurpation of the legislative function—a practice this Court has categorically condemned. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 644-5, 112 S.Ct. 1644, 1648-9 (1992) (noting that it is Congress—and not the Court—that has authority to add a "good faith limitation" to Bankruptcy Code Section 522(l)).

B. To the Extent Congress Wanted to Permit Third Parties to Exercise Any of the Rights and Powers Created in Favor of the Trustee, It Did so Expressly

The appropriateness of construing Bankruptcy Code Section 506(c) in accordance with its plain and unambiguous terms is reinforced by the fact that when Congress wanted to permit third parties to exercise any of the substantive rights and powers created in favor of the trustee, it did so by using explicit and precise language. Thus, for example, in Bankruptcy Code Section 522(h), Congress expressly grants individual debtors a qualified right to use certain of the trustee's "avoidance powers" (such as, the power to avoid preferential transfers under Bankruptcy Code Section 547) to recover property that is subject to exemption under Bankruptcy Code Section 522(b). Although the trustee is clearly empowered to recover such property, Congress recognized that a trustee

will often "have little incentive to recover assets which [ultimately do not] go to creditors." *Deel Rent-a-Car, Inc. v. Levine*, 721 F.2d 750, 757 (11th Cir. 1983). Accordingly, Section 522(h) expressly authorizes a debtor to exercise a trustee's avoidance powers to recover exempt property in the event the trustee fails to do so.

While Hartford asserts similar concerns about the trustee's alleged lack of incentive to pursue recoveries under Bankruptcy Code Section 506(c), Congress did not share these concerns in framing the language of Section 506(c). Consequently, in contrast to the express authorization afforded under Section 522(h), the Bankruptcy Code is devoid of any language authorizing third parties claimants such as Hartford to exercise the trustee's right to seek surcharge recoveries under Section 506(c).

In addition to Bankruptcy Code Section 522(h), there are several other examples in the Bankruptcy Code where Congress expressly authorized a third party to utilize one or more of the rights and powers created in favor of the trustee. Thus, for instance, Bankruptcy Code Section 1303 expressly authorizes a Chapter 13 debtor to exercise (to the exclusion of the trustee) certain of the trustee's rights to use, sell or lease property of the bankruptcy estate under Bankruptcy Code Section 363. *See also* 11 U.S.C. § 1304 (expressly granting certain Chapter 13 debtors a qualified right to exercise certain of the trustee's rights and powers under Bankruptcy Code Section 363(c) and Bankruptcy Code Section 364). Similarly, Bankruptcy Code Section 1107(a) expressly authorizes a Chapter 11 debtor-in-possession to exercise all of the rights and powers of the trustee except for the right to receive compensation under Bankruptcy Code Section 330. *See also* 11 U.S.C. § 902(5) (generally authorizing a municipal debtor in a Chapter 9 bankruptcy proceeding to exercise the rights and powers of a trustee);

11 U.S.C. § 1203 (expressly conferring upon a Chapter 12 debtor all of the rights and powers of a trustee except for the right to receive compensation under Bankruptcy Code Section 330).

As the foregoing provisions demonstrate, to the extent Congress recognized a need for allowing third parties to utilize the substantive rights and powers created in favor of the trustee, it expressly provided for it. Undeniably, there is no such express authorization permitting administrative claimants such as Hartford to utilize the trustee's rights under Section 506(c). *See BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537, 114 S.Ct. 1757, 1761 (1994) (citations omitted) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits in another").

C. Hartford Seeks to Manufacture Ambiguity Where None Exists

Refusing to acknowledge Section 506(c)'s plain and unambiguous language, Hartford attacks the Court below for invoking the ancient maxim *expressio unius est alterius exclusio*—a canon of construction to which this Court has frequently cited and relied throughout its history. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 174-5, 2 L. Ed. 60, 70 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed. . ."). As an alternative method of interpretation, Hartford urges the Court to engage in the seemingly metaphysical exercise of listening attentively to what Section 506(c) does not say. *See* Brief for Petitioner, p. 29. Specifically, Hartford contends that "what [ultimately] matters is that section 506(c) does not say that 'only' a trustee may enforce its provisions." *Id.* In an attempt to support this point, Hartford cites to a series of different provisions in the Bankruptcy Code in which Congress em-

ployed the qualifier "only" when identifying certain parties or expressly excluded certain parties from requesting different types of relief.

In contrast to Section 506(c), however, the provisions cited and relied upon by Hartford—with two notable exceptions [4]—do not involve any of the rights and powers created in favor of a bankruptcy trustee but instead, generally concern various administrative and procedural matters with respect to which the inclusion of the term "only" or other qualifying language is dictated by the context or purpose of the provision.[5] As is uniformly exhibited throughout the Bankruptcy Code, when establishing rights and powers in favor of the trustee, Congress did not undertake the profoundly unnecessary step—now deemed essential by Hartford—of inserting language expressly precluding third party claimants from exercising those same rights and powers.

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[4] The two exceptions are: Bankruptcy Code Section 1303 and Bankruptcy Code Section 1304. As fully described above, however, far from supporting Hartford's position, these provisions illustrate the point that when Congress wanted to permit third parties to exercise rights and powers created in favor of a trustee, it did so expressly.

[5] Thus, Hartford cites to: (a) Bankruptcy Code Section 109—a provision identifying who is eligible to be a debtor under different Chapters of the Bankruptcy Code; (b) Bankruptcy Code Section 303(a)—a provision identifying the parties that may be subject to an involuntary bankruptcy filing; (c) Bankruptcy Code Section 307—a provision describing the Office of U.S. Trustee's right to be heard on certain matters; (d) Bankruptcy Code Section 341(c)—a provision clarifying that bankruptcy judges are not to conduct or attend creditor's meetings; (e) Bankruptcy Code Section 702(a)—a provision identifying the creditors eligible to vote on the election of a Chapter 7 trustee; (f) Bankruptcy Code Section 706(c)—a provision giving the debtor the right to convert certain proceedings to another Chapter of the Bankruptcy Code; (g) Bankruptcy Code Section 1109(a)—a provision giving the Securities and Exchange Commission a qualified right to be heard in Chapter 11 proceedings; (h) Bankruptcy Code Section 1112—a provision giving the debtor

Thus, for example, under the provisions of Bankruptcy Code Section 547(b), the trustee is given the power to "avoid" certain transfers made by the debtor within the ninety day period preceding the commencement of a bankruptcy proceeding. 11 U.S.C. § 547(b). Bankruptcy Code Section 547, however, does not expressly state that this power is to be exercised "solely" by the trustee or that it is a power existing in favor of "the trustee and only the trustee." Instead, like Section 506(c), Bankruptcy Code Section 547 simply identifies the avoidance of preferential transfers as a power to be exercised by "the trustee." *See* 11 U.S.C. § 547(b) ("the trustee may avoid. . ."). Nevertheless, it is clear that notwithstanding the fact that Bankruptcy Code Section 547 does not say "only" the trustee may bring preference actions, individual claimants do not have an independent right to bring preference actions and retain any resulting recovery for their own exclusive benefit (as Hartford proposes to do under Section 506(c) in the instant case).[6]

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the ability to convert a Chapter 11 proceeding to different Chapters under the Bankruptcy Code; (i) Bankruptcy Code Section 1121—a provision giving a Chapter 11 debtor-in-possession a qualified right to be the only party that files and seeks the confirmation of a Chapter 11 plan; (j) Bankruptcy Code Section 1164—a provision giving certain governmental agencies a limited right to be heard in a railroad reorganization; and (k) Bankruptcy Code Section 1307(c)(9) and (10)—provisions authorizing the Office of the U.S. Trustee to seek the dismissal of certain Chapter 13 proceedings.

[6] In their *Amici* Brief, the American Insurance Association and National Union Fire Insurance Company of Pittsburgh, Pa. cite to a series of cases in support of the assertion that in accordance with the omission of the word "only" or similar qualifying language in Bankruptcy Code Section 547 and the Bankruptcy Code's other avoidance power provisions, the majority of circuit courts "have held that creditors and their committees may bring such avoidance actions." Brief of *Amici Curiae*, pp. 16-17. Without exception, however, the cases cited by *amici curiae* all involve situations in which the trustee or the Chapter 11 debtor-in-possession refused to bring an avoidance action and, in response, the court granted (or recognized its ability to grant) so-called "derivative standing" to a creditor or creditors' committee to pursue the avoidance action *on behalf of the bankruptcy estate. See Canadian Pacific Forest Products Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995) (setting forth detailed steps that must be followed before creditor or creditors' committee can obtain derivative standing to bring avoidance action on behalf of the estate); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1363 (5th Cir. 1986) (noting that unsecured creditors committee could bring preference action if Chapter 11 debtor in possession failed to do so); *Unsecured Creditors Committee of Debtor STN Enterprises, Inc. v. Noyes (In re STN Enterprises)*, 779 F.2d 901, 904 (2d Cir. 1985) (committee may obtain derivative standing to bring preference action when trustee or Chapter 11 debtor in possession unjustifiably fails to do so); *Official Unsecured Creditors Committee of Suffola, Inc. v. U.S. National Bank (In re Suffola, Inc.)*, 2 F.3d 977, 979 n.1 (9th Cir. 1993) (same); *see also In re Groves Farms, Inc.*, 64 B.R. 276, 277 (Bankr. S.D. Ind. 1986) (wherein the court, in refusing to allow administrative claimant to pursue private right of recovery under Section 506(c), observed that "[i]n all of those situations known to this Court, where the express language of the Code has been ignored to allow some non-trustee or non-debtor to assert a right [of the trustee], the actions of that non-trustee or non-debtor were aimed at benefiting the estate and all creditors.").

Similarly, Bankruptcy Code Section 363 gives the trustee the power to use, sell or lease property of the bankruptcy. Like Section 506(c), however, Bankruptcy

Unlike the parties in the cases cited by *amici curiae*, Hartford is not seeking "derivative standing" to assert a surcharge claim on behalf of the bankruptcy estate. Instead, it is seeking to pursue a private right of recovery under Section 506(c) which, if successfully asserted, will inure to its sole and exclusive benefit. As several authorities have observed, it is the failure to recognize this critical and fundamental distinction—that is, between derivative standing on the one hand and allowing a creditor to pursue a private right of recovery on the other—that has caused many courts and litigants to erroneously conclude that third party administrative claimants should be allowed to proceed under Section 506(c). *See, e.g., Piedmont Farm Credit, ACA v. G & M Milling Company (In re Caldwell)*, 147 B.R. 119, 121 (M.D.N.C. 1992) ("The circuit court cases fail to recognize the distinction between derivative and independent standing"); *Boyd v. Dock's Corner Associates (Matter*

Code Section 363 does not say "only" the trustee has the right to use, sell or lease property of the bankruptcy estate. *See, e.g.*, 11 U.S.C. § 363(b) ("the trustee, after notice and a hearing, may use, sell, or lease, . . ."). Again, however, it cannot be seriously suggested that because Bankruptcy Code Section 363 does not refer to "only" the trustee, creditors and administrative claimants also have the right to use, sell or lease property of the bankruptcy estate and may do so for their own private benefit.[7]

The reason it was unnecesary for Congress to include express "words of preclusion" in the various provisions setting forth the rights and powers of a trustee is self-evident when one considers the unique role the trustee occupies in the overall scheme and purpose of bankruptcy

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of Great Northern Forest Products, Inc.), 135 B.R. 46, 68 (Bankr. W.D. Mich. 1991) (noting critical distinction "between independent and derivative standing to assert a trustee's cause of action."); L. Snider and K. Noble, *Standing to Surcharge the Secured Creditor: Policy, Plain Meaning, and Payment Under Section 506(c) of the Bankruptcy Code*, 5 J. Bankr. L. & Prac. 301, 308 (March/April 1996) ("Courts that have granted standing to unpaid administrative claimants have failed to distinguish between direct and derivative standing."). While one may at least debate whether the concept of derivative standing is consistent with the plain and unambiguous language of Section 506(c), the same argument cannot obtain with respect to an alleged private right of recovery under Section 506(c).

[7] *See also* 11 U.S.C. § 364 (giving the trustee the power to incur debt on behalf of the bankruptcy estate, but not providing that "only" the trustee may exercise this power); 11 U.S.C. § 365 (giving the trustee the power to assume or reject the debtor's "executory contracts" and unexpired leases, but not providing that "only" the trustee may exercise this power); 11 U.S.C. §§ 544, 548, 549 and 553 (giving the trustee various powers to avoid different types of transfers, but not providing that "only" the trustee may exercise these powers), 11 U.S.C. § 554 (giving the trustee the power to abandon property of the bankruptcy estate, but not providing that "only" the trustee may exercise this power.)

law. Specifically, bankruptcy law is premised upon on the central concern that the system of individual creditor remedies that exists outside of bankruptcy "may be bad for the creditors as a group when there are not enough assets to go around." T. Jackson, *The Logic and Limits of Bankruptcy Law*, p. 10 (1986). To address this problem, "the bankruptcy process substitutes collective creditor conduct [in place of] unilateral creditor action." *Foster Development Corporation v. Morning Treat Coffee Company, Inc. (In re Morning Treat Coffee Company, Inc.)*, 77 B.R. 62, 65, n.6 (Bankr. M.D. La. 1987). Thus, instead of allowing each creditor to pursue its own individual collection efforts, bankruptcy provides for the appointment of a trustee who is charged with the responsibility of seeking to maximize the total pool of assets available to the creditor body as a whole. *See* 11 U.S.C. § 704(1); *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985) ("The trustee. . . has the duty to maximize the value of the estate").

As part of this process, the trustee is given various rights and powers which are designed to assist in maximizing the assets generally available to creditors. Obviously, it would be entirely antithetical to bankruptcy's function as a collective debt collection procedure if these very same rights and powers—rights and powers which the trustee must exercise for the collective benefit of all creditors—were also made available to individual creditors to utilize for the collection of their individual claims.[8] Thus, it was unnecessary, and would have been

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[8] Recognizing the inherent contradiction in allowing individual creditors to utilize the trustee's rights and powers to pursue their own individual recoveries, many authorities have criticized those decisions permitting third party claimants to proceed under Section 506(c) on the basis that the courts in those decisions are, in effect, promoting a return to the very circumstances that bankruptcy is

patently redundant, for Congress to include in the various sections of the Bankruptcy Code setting forth the trustee's substantive rights and powers—including Section 506(c) —language expressly precluding individual creditors from utilizing those same rights and powers to pursue the recovery of their individual claims. Indeed, Hartford's effort to attach significance to the absence of such language in Section 506(c) must ultimately be seen as a transparent attempt to create ambiguity where it unmistakably does not exist.

D. In Contrast to the Proposed Construction Advanced by Hartford, a Plain Meaning Construction of Section 506(c) Is Fully Consistent With the Bankruptcy Code's Priority and Distribution Provisions

As this Court recognized in *Beiger v. I.R.S.*, 496 U.S. 53, 58, 110 S.Ct. 2258, 2262-3 (1990), one of the Bankruptcy Code's primary goals is "[e]quality of distribution among creditors." Specifically, the Bankruptcy Code seeks to insure that "creditors of equal priority . . . receive pro rata shares of the debtor's property." *Id.*

Allowing a trustee to recover certain administrative expenses from a secured creditor's collateral under Section

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designed to ameliorate, that is, a creditor "free for all" in which individual creditors vie against one another to realize against the debtor's limited assets. *See, e.g., Dock's Corner Associates v. Boyd (Matter of Great Northern Forest Products, Inc.)*, 135 B.R. 46, 69 (Bankr. W.D. Mich. 1991) ("[t]aking the holding in McKeesport to its logical extreme, every unpaid administrative claimant could sue a secured creditor under § 506(c) to seek to recover asserted costs or expenses [and] . . . [a]ny successful recovery would benefit the individual claimant . . . Such an interpretation may willy-nilly spawn satellite actions resulting in a litigation free for all"). The latter concern is borne out by such cases as *Matter of Bluffton Castings Corporation*, 224 B.R. 902 (Bankr. N.D. Ind. 1998) (wherein a Chapter 7 trustee was forced to compete against two administrative claimants—who, like Hartford, were seeking to recovery solely for themselves—to collect certain surcharge recoveries under Section 506(c)).

506(c) is entirely consistent with this policy, for any amounts recovered by a trustee under Section 506(c) become part of the bankruptcy estate and must be distributed evenly among creditors according to the relative priorities of their claims. *See, e.g., Matter of Oakland Care Center, Inc.*, 142 B.R. 791, 794 (E.D. Mich. 1992) ("When a trustee or debtor in possession recovers a claim under section 506(c), the recovery becomes property of the estate under section 541(a)(7).").

The same is not true, however, if a third party claimant such as Hartford is permitted to pursue an individual right of recovery under Section 506(c). Specifically, because such a claimant is acting on its own behalf rather than on behalf of the bankruptcy estate, none of the amounts it recovers are distributed or otherwise shared with any of the other administrative expense claimants of the bankruptcy estate. Instead, the administrative claimant retains the resulting recovery for its sole and exclusive benefit (as Hartford proposes to do in this case).

As both the court below and numerous other courts have recognized, this will often mean that if permitted to proceed under Section 506(c), third party claimants such as Hartford may recover in full while other administrative claimants receive considerably less or, possibly, nothing. *Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994) ("if an estate has no unencumbered assets, an administrative claimant recovering directly from a secured creditor might receive full reimbursement while other administrative claimants, whose services were also necessary to the preservation of the estate, would receive nothing."). Unquestionably, such a result contradicts the Bankruptcy Code's goal of promoting equal distribution among similarly situated credi-

tors, for there is nothing in the Bankruptcy Code that creates a special priority in favor of administrative expense claimants whose goods and services benefit a secured creditor's collateral.[9] *Central States, Southeast and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 504 (Bankr. W.D. Mich. 1988) ("No Code section distinguishes between administrative claimants . . . whose credit benefited a secured creditor and those whose credit benefited the estate generally.").

The foregoing problem is exacerbated in situations like the present where the bankruptcy case has been converted from a Chapter 11 proceeding to a Chapter 7 proceeding. Specifically, when a case is converted from a Chapter 11 to a Chapter 7 proceeding, Bankruptcy Code Section 726(b) provides that administrative expense claims of the Chapter 7 proceeding are to be paid in full before there is any distribution to the Chapter 11 claimants. If, however, Chapter 11 administrative claimants such as Hartford are permitted to pursue private rights of recovery under Section 506(c), they can effectively turn this distribution rule on its head. Specifically, by recovering under Section 506(c), Hartford and other similarly situated claimants may be able to obtain payment in full while legitimate administrative expenses of the Chapter 7 proceeding remain partially or completely unpaid. *See Central States, Southeast, and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight System IMFS, Inc.)*, 71 B.R. 741, 744 (Bankr. W.D. Mich. 1987) ("to permit a Chapter 11 administrative expense claimant to recover its claim while Chapter 7 administrative claimants . . .

[9] Hartford contends that such a special priority exists under the provisions of Bankruptcy Code Section 506(c). As more fully discussed *infra.*, this contention is devoid of any textual support and directly contradicts the express terms of the Bankruptcy Code's priority and distribution provisions.

go unpaid . . . would be a violation of § 726(b)."); *In re J.R. Research, Inc.*, 65 B.R. 747, 751 (Bankr. D. Utah 1986) ("This Court cannot in good conscience allow [parties] to circumvent the priority scheme set forth by Congress in § 726(b).").[10]

E. Hartford's Characterization of Bankruptcy Code Section 506(c) as a "Priority Provision" Is an Implausible Construction That Is Not Only Devoid of Any Textual Basis But Directly Conflicts With the Bankruptcy Code's Priority and Distribution Provisions

Far from denying the foregoing analysis, Hartford fully acknowledges that if allowed to proceed under Section 506(c), administrative claimants such as itself may be able to recover in full while other administrative claimants—potentially including administrative claimants of the Chapter 7 estate—recover nothing. Nonetheless, Hartford maintains that this result is exactly what Congress intended, for—according to Hartford—Section 506(c) is really a "priority provision." *Brief for Petitioner*, p. 11. Indeed, under Hartford's construction, even when a trustee successfully recovers under Section 506(c), the

[10] The pernicious effect that Hartford's proposed construction of Section 506(c) has on the Bankruptcy Code's priority scheme and the Bankruptcy Code's overall function as a collective debt collection procedure is well-illustrated by cases such as *Matter of Bluffton Castings Corporation*, 224 B.R. 902 (Bankr. N.D. Ind. 1998), wherein a Chapter 7 trustee was forced to compete against two administrative claimants to recover certain expenses from a secured creditor's collateral under Section 506(c). While the trustee sought to recover the expenses on behalf of the bankruptcy estate so that the resulting recovery could be distributed to all creditors in accordance with the Bankruptcy Code's priority and distribution provisions, the administrative claimants (like Hartford in the instant case) made clear that they intended to apply any amounts they recovered solely to their own claims. Dismissing the administrative claimants' action, the *Bluffton* court correctly concluded that the right of recovery under Section 506(c) exists only in favor of the Chapter 7 trustee as the representative of all creditors. *Id.*, at 904-5.

resulting proceeds should not be distributed along with the other assets of the estate but, rather, earmarked and paid directly to the administrative claimant whose goods or services gave rise to the surcharge claim.

This proposed construction is both conceptually and textually untenable. First, Hartford's assertion that a trustee pursues surcharge recoveries under Section 506(c) for the benefit of particular administrative claimants is irreconcilable with the fundamental nature and role of the trustee. As noted above, the trustee serves as "the representative of the [bankruptcy] estate." 11 U.S.C. § 323(a). As such, the trustee must act for the collective benefit of all creditors "and not on behalf of any individual creditor." *In re Bell & Beckwith*, 50 B.R. 422, 434 (Bankr. N.D. Ohio 1985); *In re Gallagher*, 70 B.R. 288, 290 (Bankr. S.D. Tex. 1987) ("A Trustee may not act on behalf of any particular creditor since she is a representative of the estate."). Thus, courts have consistently held that a trustee may not pursue "personal claims of creditors." *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987); *Mixon v. Anderson (In re Ozark Restaurant Equipment Co., Inc.)*, 816 F.2d 1222, 1228 (8th Cir. 1987) (there is nothing in "the liquidation framework of the [Bankruptcy Code] authorizing a Chapter 7 trustee to collect money not owed to the estate."); *see also Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678 (1972) (Reorganization trustee under Chapter X of former Bankruptcy Act could not pursue claims on behalf of individual debenture holders); *but see In re McKeesport Steel Castings Co.*, 799 F.2d 91, 93-4 (3rd Cir. 1986) (supporting view that amounts recovered by trustee under Section 506(c) are paid over to the administrative claimant whose goods or services gave rise to the surcharge claim). Under Hartford's proposed construction of Section 506(c), however, the trustee would be pursuing a recovery solely for

the benefit of an administrative claimant such as Hartford.[11] *Central States, Southeast and Southwest Areas Pension Fund v. Robbins (In re Interstate Motor Freight Systems IMFS, Inc.)*, 86 B.R. 500, 506 (Bankr. W.D. Mich. 1988) ("allowing use of powers created by the Bankruptcy Code for the benefit of one creditor alone [is] a result to be avoided.").

Also in keeping with the trustee's role as the estate representative, it is well established that any monies recovered by a trustee are for the collective benefit of all creditors (rather than any individual creditor) and, as such, must be distributed on a pro-rata basis in accordance with the Bankruptcy Code's priority and distribution schemes. Indeed, this principle dates back to this Court's ruling in *Moore v. Bay*, 284 U.S. 4, 52 S.Ct. 3 (1931), where the Court held that certain property recovered by a trustee had to be administered for the pro-rata benefit of all creditors, even though the trustee recovered the property by utilizing the lien avoidance rights of certain individual creditors. As modern courts have recognized, the holding in *Moore v. Bay* has been incorporated in the Bankruptcy Code and mandates that property recovered by a trustee "be treated like any other asset of the estate,

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11 As one commentator has observed, if taken to its logical conclusion, the proposed construction being advanced by Hartford would require that a surcharge action brought by a trustee be dismissed for "lacking of standing" as the trustee does not have authority to proceed on behalf of one creditor. *See* G. Hesse, *One Statute, Three Disparate Interpretations: Standing to Pursue Recovery From A Secured Creditor Pursuant to Bankruptcy Code Section 506(c)*, 47 Baylor L. Rev. 39, 54-5 (1995) ("the McKeesport line of cases wrongly assumes that the monies recovered from a surcharge of the collateral of the secured creditor will be earmarked for payment to a specific administrative claimant . . . if a court were to follow the McKeesport rationale to its logical conclusion, it should deny standing to the trustee attempting to sue under Section 506(c) because the trustee would not profit from the action.").

to be distributed pro rata to all creditors under the bankruptcy distribution scheme." *In re Boyd*, 121 B.R. 622, 625 (Bankr. N.D. Fla. 1989); *Still v. Congress Financial Corporation (In re Southwest Equipment Rental, Inc.)*, 102 B.R. 132, 139 (E.D. Tenn. 1989); *In re Fiegaro*, 79 B.R. 914, 918 (Bankr. D. Nev. 1987) ("The law established in Moore is well settled, and has been clearly incorporated into the Bankruptcy Code."). Again, Hartford's proposed construction of Section 506(c)—under which a trustee's surcharge recoveries would be earmarked and paid to particular administrative claimants—would directly violate this fundamental principle.

Separate and apart from the above-referenced considerations, it is evident that Hartford's characterization of Section 506(c) as a priority provision is devoid of any textual basis or support. Thus, Section 506(c) does not identify or even reference the administrative claimants on whose behalf the alleged priority is created. Indeed, the only parties mentioned in Section 506(c) are the trustee and the secured creditor. Similarly, Section 506(c) does not contain any language regarding the relative priority of any claims or the manner in which any funds collected or recovered by the trustee are to be distributed.

In contrast, the subject of "priorities" is expressly and comprehensively addressed in Bankruptcy Code Section 507. *See U.S. v. Reorganized CF & I Fabricators of Utah Inc.*, 518 U.S. 213, 218, 116 S.Ct. 2106, 2110 (1996) ("The provisions for priorities among a bankrupt debtor's claimants are found in 11 U.S.C. § 507"). Specifically, Section 507 sets forth a very carefully crafted list of claims that are entitled to priority in a bankruptcy proceeding and defines the relative priority of these claims with respect to one another. Although Section 507 creates a priority in favor of administrative expense claimants (*see* 11 U.S.C. § 507(a)(1)), it does not recognize a special priority in favor of or otherwise distinguish in any way

those administrative expense claimants whose goods or services benefited a secured creditor's collateral. Significantly, however, Bankruptcy Code Section 507(b) does create a special priority rule for certain administrative expense claims arising as a result of a secured creditor's failure to receive "adequate protection." 11 U.S.C. § 507(b). As the latter provision demonstrates, when Congress wanted to create a unique priority rule in favor of a particular group of administrative expense claimants, it did so explicitly and definitively.

Similarly, Bankruptcy Code Section 726 expressly addresses the subject of "distribution" in a Chapter 7 proceeding. Again, while this section contains very detailed rules regarding the order in which funds are to be distributed to different claimants, it contains no reference whatsoever to any special distribution rule in favor of administrative claimants whose goods or services benefited a secured creditor's collateral. As noted above, however, Bankruptcy Code Section 726 does provide for a special distribution rule in favor of Chapter 7 administrative expense claimants when the bankruptcy case has been converted from another Chapter of the Bankruptcy Code (*see* 11 U.S.C. § 726(b))—again, demonstrating that when Congress wanted to create a special priority or distribution rule in favor of a particular group of administrative expense claimants, it expressly did so.

Thus, in short, Hartford posits that although Congress intended to establish a special priority and distribution rule in favor of administrative claimants such as itself, it did not place (or even so much as reference) that rule in any of the sections of the Bankruptcy Code expressly addressing those subjects. Instead, according to Hartford, Congress cryptically concealed the rule in a section of the Bankruptcy Code that contains no mention whatsoever of the parties who are the rule's purported beneficiaries. Clearly, there is no accepted canon of statutory construc-

tion that would permit such a tortured reading of the statute. It is apparent that what Hartford truly seeks is the establishment of a special "common law" rule of priority. Yet, as this Court has repeatedly recognized, the authority to establish such a rule lies not with the judiciary but with the legislative branch of government. *See U.S. v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 227, 116 S.Ct. 2106, 2114 (1996) ("categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority."); *U.S. v. Noland*, 517 U.S. 535, 541, 116 S.Ct. 1524, 1527 (1996) (reordering of statutory priorities "is a legislative type of decision").

Perhaps, most significantly, Hartford's proposed construction of Section 506(c) as a priority provision illustrates the dangers of not construing a statute as carefully and tightly crafted as the Bankruptcy Code in accordance with its plain meaning. Thus, while Hartford begins by asking the Court to look beyond the plain and unambiguous language of Section 506(c), it ultimately ends up insisting that the Court rewrite the Bankruptcy Code's priority and distribution provisions as well. In contrast, under a plain meaning construction of Section 506(c), the operation and effect of the Bankruptcy Code's priority and distribution provisions are fully honored and respected. *See U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030 (1988) ("as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

F. Even If It Were Applicable, Bankruptcy Code Section 1109(b) Does Not Provide A Basis For Disregarding Section 506(C)'s Clear And Unambiguous Terms

Hartford also attempts to circumvent Section 506(c)'s clear and unambiguous language by invoking the provisions

of Bankruptcy Code Section 1109(b), which give certain parties in a Chapter 11 proceeding a procedural right to "raise and [] appear and [] be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). As the court below correctly concluded, Hartford's reliance on this provision is ill-founded, for Section 1109(b) is inapplicable to "the Chapter 7 proceeding which underlies this case." App., 302a.

Although Hartford continues to dispute the latter conclusion and insists that it should be allowed to invoke Section 1109(b) because its claim arose during the Chapter 11 proceeding, the fact remains that Section 1109(b) —by its very terms—only applies to issues in "a case under [Chapter 11]." Moreover, the inapplicability of Section 1109(b) is further reinforced by the provisions of Bankruptcy Code Section 103(f), which expressly provide that "subchapters I, II and III of chapter 11 of this title apply only in a case under such chapter." *See, e.g., In re Taylor & Associates, L.P.*, 191 B.R. 374, 381, n 5 (Bankr. E.D. Tenn. 1996).

Given the provision's obvious inapplicability, it is not surprising that Hartford failed to make any references whatsoever to Section 1109(b) in its original *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c).* App., 207a-211a.

More significantly, however, even if Hartford could properly invoke the provisions of Section 1109(b), these provisions clearly do not give Hartford the right to pursue substantive remedies to which it is otherwise not entitled —such as those set forth in Section 506(c). Section 1109(b) is designed to give certain parties in a Chapter 11 proceeding a *procedural* right to be heard on different issues. It does not, however, create any substantive rights (nor does it give those parties involved in a Chapter 11

proceeding a roving license to utilize for their own personal benefit the various substantive rights created in favor of the trustee and Chapter 11 debtor-in-possession). Indeed, this point is apparent even in the case cited and principally relied upon by Hartford—*Matter of James Wilson Associates*, 965 F.2d 160 (7th Cir. 1992)—wherein the court held that notwithstanding the provisions of Section 1109(b), a real estate mortgagee had no basis to complain about a Chapter 11 debtor-in-possession's failure to follow the appropriate procedural steps in assuming an unexpired lease under Bankruptcy Code Section 365. Of course, in the situation at hand, Hartford seeks to go several steps beyond the mortgagee in *James Wilson Associates* case—by not only directly exercising a power created in favor of the trustee, but also doing so for its sole and exclusive benefit.

G. The Claim Allowance Provisions Set Forth in Bankruptcy Code Section 502 Also Fail to Provide Any Basis for Disregarding Section 506(c)'s Plain and Unambiguous Terms

In a further effort to persuade the Court to look beyond Bankruptcy Code Section 506(c)'s plain and unambiguous terms, Hartford contends that it should be allowed to recover under Section 506(c) because pursuant to the provisions of Bankruptcy Code Section 502(a), it could have objected to the allowance of Union Planters' claim on the basis that Union Planters' collateral is subject to surcharge under Section 506(c). As with Hartford's reliance on Bankruptcy Code Section 1109(b), this argument is misplaced and lacks any statutory foundation.

First and most apparently, if Hartford believes that it could have obtained the very same relief it is currently seeking by exercising certain rights under Bankruptcy Code Section 502, then it should have exercised those

rights. Hartford cannot now use its failure to exercise whatever rights it believes it had under Section 502 (or any other provision) as a basis for obtaining authority to seek relief under a statutory provision that by its plain and unambiguous terms does not afford a right of recovery in favor of third party claimants such as Hartford.

Moreover, it is clear that Hartford's underlying premise —that it could have objected to the allowance of Union Planter's claim on the basis that Union Planters' collateral is subject to surcharge under Section 506(c)—is manifestly incorrect. As Hartford accurately notes, unlike Section 506(c), Bankruptcy Code Section 502(a) expressly authorizes any "party in interest" to object to the allowance of a claim. Bankruptcy Code Section 502, however, also sets forth a detailed and exhaustive list of the different grounds upon which claims may be disallowed. See 11 U.S.C. § 502(b)(1)-(9). Nowhere in the foregoing list is there any provision which provides for the disallowance of a secured claim because the secured creditor's collateral is subject to surcharge under Section 506 (c). In marked contrast, however, Bankruptcy Code Section 502(d) expressly provides for the disallowance of a claim on the basis that the creditor asserting the claim has failed to relinquish money and/or property subject to turnover, avoidance and/or recovery under Bankruptcy Code Sections 522, 542, 543, 544, 545, 547, 548, 549, 550, 553 or 724(a). Unquestionably, the conspicuous absence of an analogous provision regarding surcharge recoveries merely underscores the invalidity of Hartford's position.[12]

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12 Hartford's reliance on the claims allowance provisions is also misplaced from the standpoint that it has never contested or challenged the amount or validity of Union Planters' claim. See App. 254a. Indeed, if anything, the relief that Hartford is seeking is most closely analogous to the equitable subordination remedy set forth in Bankruptcy Code Section 510(c). Hartford did not invoke the latter provision nor could it have properly done so. *See In re Groves Farms, Inc.*, 64 B.R. 276, 277 (Bankr. S.D. Ind. 1986) (where

H. Alleged Policy Considerations Raised by Hartford Do Not Provide a Basis for Disregarding Section 506(c)'s Plain and Unambiguous Terms

As this Court has recognized time and again, when the language of a statute is plain and unambiguous, it is not permissible to consider alternative constructions based upon supposed policy and/or equitable considerations. Instead, the statute must be construed and applied "according to its terms." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989); *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2191 (1993); *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 969 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 527, 104 S.Ct. 1188, 1196 (1984) ("The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity."). Thus, to the extent Hartford feels that the plain and unambiguous language of Section 506(c) is inequitable, it should address its concerns "to the Congress, not the courts." *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 480, 117 S.Ct. 913, 921 (1997).

Furthermore, the various policy and/or equitable considerations that Hartford raises in opposition to a plain meaning construction of Section 506(c) are not well-founded. Hartford thus maintains that trustees often lack sufficient incentive to pursue surcharge recoveries under Section 506(c). *Brief for Petitioner*, p. 6. In making this contention, however, Hartford falsely assumes that any amounts recovered by a trustee under Section 506(c) are earmarked for and paid over in their entirety to the

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the court refused to allow a third party claimant to use the provisions of Bankruptcy Code Section 510(c) to circumvent the fact that Section 506(c) only creates a right of recovery in favor of the trustee).

administrative expense claimant who provided the surcharge claim services. As more fully discussed above, the latter notion not only directly conflicts with the Bankruptcy Code's priority and distribution provisions, it is incompatible with the trustee's role as the representative of the estate.

Indeed, as numerous courts have recognized, it is precisely because the trustee is the representative of the estate—and, as such, owes a fiduciary duty to all creditors—that it is erroneous to suggest that she lacks sufficient incentive to pursue surcharge claims under Section 506(c). *See, e.g., Ford Motor Credit Company v. Reynolds & Reynolds Company (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 485 (4th Cir. 1994). In accordance with her fiduciary duties, the trustee must seek to maximize the value of the estate, which clearly includes pursuing any potential claims under Section 506(c) that might result in a net recovery to the estate. Indeed, if the trustee fails to pursue such a recovery, she could be held personally liable.[13] *Id.*; *Harstad v. First American Bank*, 39 F.3d 898, 903 (8th Cir. 1994) (debtors-in-possession may breach their fiduciary duties if they fail to bring preference actions).

Interestingly, while Hartford repeatedly emphasizes its concerns about the lack of incentive trustees have to pursue surcharge claims under Section 506(c) and points to

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[13] As the court pointed out in *JKJ Chevrolet*, in addition to having a fiduciary obligation, a trustee might also have a personal incentive in insuring that all cost/beneficial recoveries under Bankruptcy Code Section 506(c) are pursued. Specifically, the trustee's own fees and expenses are treated as an administrative expense of the bankruptcy estate and, in recovering such fees and expenses, the trustee must share equally with other administrative expense claimants. Accordingly, if it appears that there may not be sufficient funds to pay all administrative expenses in full, any net recoveries under Section 506(c) will increase the extent to which the trustee recovers her own fees and expenses. *JKJ Chevrolet*, 26 F.3d at 485.

this case as a striking example of that lack of incentive, there is nothing in Hartford's *Application for Allowance of Administrative Expense Pursuant to 11 U.S.C. Section 503 and Charge Against Collateral Pursuant to 11 U.S.C. Section 506(c)* or anywhere else in the record suggesting that Hartford ever requested the Trustee to pursue the recovery of the amounts in question. App. 207a-211a; *see also* Brief for Petitioner, p. 5, n.4. If Hartford truly believed that the Trustee had breached his fiduciary duty by failing to seek the recovery of the premiums currently at issue, it could and should have undertaken appropriate steps to bring the matter to the attention of the Bankruptcy Court. *See JKJ Chevrolet*, 26 F.3d at 485 (suggesting that if a trustee fails to pursue what a creditor believes is a worthwhile surcharge claim under Section 506(c), the creditor could request the bankruptcy court to compel the bankruptcy trustee to pursue the claim or request that the bankruptcy court remove the trustee); *see also Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 274 n.21, 112 S.Ct. 1311, 1321 n.21 (1992) ("it is generally held that a creditor can, by petitioning the bankruptcy court for an order to that effect, compel the trustee to institute suit against a third party."). Instead, Hartford chose to bring its own action under Section 506(c) pursuant to which it hoped to obtain a recovery not to be shared with any other creditors.

Additionally, Hartford argues that if third-party claimants are not afforded a right of recovery under Section 506(c), secured creditors will realize a "windfall." As numerous courts and commentators have observed, however, there are many other means (aside from Section 506(c)) by which administrative claimants can protect their interests. Thus, an unpaid administrative creditor always has the option of ceasing to do business with the debtor if it is concerned that the debtor will ultimately lack sufficient funds to pay it. *See* J. Galton and F. McGovern, *Standing Under Section 506(c) of the Bankruptcy Code Reexamined*, 99 Comm. L.J. 464, 474 (Winter 1994) ("Galton & McGovern") ("It should not be forgotten that the administrative claimant makes a conscious, voluntary credit decision to sell goods or provide services to the estate on an unsecured basis. To attempt thereafter, to use Section 506(c) to improve the claimant's position in effect from unsecured to secured at the expense of the secured creditor (who often is involuntarily involved in the proceeding) does not appear to bear an equitable result.").

A party also can protect against possible nonpayment by insisting upon receiving cash on delivery or cash in advance. Alternatively, if a party's relationship with a bankruptcy debtor necessitates the extension of some type of credit, that party may be able to fully protect its position by obtaining appropriate collateral from the bankruptcy estate in accordance with the provisions of Bankruptcy Code Section 364. 11 U.S.C. § 364(c) and (d) (giving the bankruptcy court authority to approve the granting of a lien—including a "priming lien"—in favor of a postpetition creditor); *see also White Front Feed & Seed, Division of Paul Lammers & Sons, Inc. v. State National Bank of Platteville (In re Ramaker)*, 117 B.R. 959, 967 (Bankr. N.D. Iowa 1990) (dismissing surcharge action filed by administrative claimants after noting "these creditors could have sought a security interest under § 364(c)."). Moreover, if a party engaged in an ongoing transaction or business relationship with a bankruptcy debtor believes that it is being exposed to significant risk of nonpayment, it may seek appropriate relief from the bankruptcy court. *See* 11 U.S.C. § 362(d)(1) (authorizing the bankruptcy court to grant parties relief from the Bankruptcy Code's "automatic stay" provisions if their interests are not being "adequately protected").

Having failed to effectively avail itself of any of the foregoing remedies and confronted by the fact that the Debtor's bankruptcy estate was administratively insolvent, Hartford sought to use Section 506(c) as a federally-created private cause of action pursuant to which it can hold Union Planters liable for the remaining balance of insurance premiums owing to it by the Debtor. As is evident from its plain and unambiguous language, Section 506(c) was never designed to serve such a function. *See, e.g., Loudoun Leasing Development Company v. Ford Motor Company (In re K & L Lakeland, Incorporated)*, 128 F.3d 203, 210 (4th Cir. 1997) (citations omitted) ("§ 506(c) should not be read to provide a means of wealth transfer from secured to unsecured creditors."); *In re Codesco, Inc.*, 18 B.R. 225, 229 (Bankr. S.D.N.Y. 1982) ("There is nothing in Code § 506(c) that creates an independent cause of action in favor of [administrative expense claimants] against the holders of secured claims or their collateral."); P. Lindauer, *Professional Fees and Section 506(c) of the Bankruptcy Code: A Plea for Secured Creditors*, 98 Dick. L. Rev. 401, 411 (1994) ("The statute does not encompass the broad notion that anyone who benefits a secured creditor must be compensated by the secured creditor.").

II. THE LEGISLATIVE HISTORY REINFORCES THE PLAIN MEANING CONSTRUCTION OF SECTION 506(c) AS CREATING A RIGHT OF RECOVERY ONLY IN FAVOR OF THE TRUSTEE AND A CHAPTER 11 DEBTOR IN POSSESSION

A. The Legislative History Refers Exclusively to the Trustee and Debtor in Possession

Because the language of Section 506(c) is clear and unambiguous, it is neither necessary nor appropriate to consider the statute's legislative history. *See, e.g., Patterson v. Shumate*, 504 U.S. 753, 761, 112 S.Ct. 2242,

2248 (1992) (citations omitted) (clarity of statutory language "obviates need for any [] inquiry [into statute's legislative history]."). As the Court stated in *Toibb v. Radloff*, 501 U.S. 157, 164, 111 S.Ct. 2197, 2201 (1991), where the plain language of statute is clear "it makes no difference whether the legislative history affirmatively reflects such an intent." Nonetheless, it is apparent that in the case of Section 506(c), the legislative history only reinforces what is made manifest by the statute's clear and unambiguous terms: the right of recovery under Section 506(c) exists solely in favor of the trustee (or debtor-in-possession) as the representative of the bankruptcy estate.

Thus, the legislative history to Section 506(c) "contains absolutely no reference to allowing a third party to attempt to surcharge a secured creditor's collateral." *Matter of Great Northern Forest Products, Inc.*, 135 B.R. 46, 66 (Bankr. W.D. Mich. 1991). Instead, the legislative history repeatedly refers to the ability of a trustee or debtor-in-possession to seek such relief. Specifically, both the official House and Senate Committee Reports provide that "Subsection (c) also codifies current law by permitting *the trustee* to recover from property [the value of which is] [14] greater than the sums of the claims secured by a lien on that property, the reasonable, necessary costs and expenses of preserving, or disposing of, the property." S. Rep. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854 (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added).

Similarly, during the floor debates in the House and Senate, the trustee and debtor-in-possession were the only

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[14] The Senate Judiciary Committee Report contains the bracketed language whereas the House Judiciary Committee Report contains the phrase "whose value is" in place of the bracketed language.

parties identified as having a right of recovery under Section 506(c):

> Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate Amendment. Any time *the trustee* or *debtor in possession* expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditors' collateral, *the trustee* or *debtor in possession* is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

124 Cong. Rec. H11089, 11095 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6451 (statement of Rep. Edwards) (emphasis added); 124 Cong. Rec. S17406, 17411 (daily ed. October 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6520 (statement of Sen. DeConcini) (emphasis added).

As the above-cited passages make clear, far from supporting a departure from the statute's clear and unambiguous terms, the legislative history to Section 506(c) further confirms Congress' intent that surcharge recoveries be pursued on behalf of the bankruptcy estate rather than on behalf of individual claimants.

B. The Legislative History Does Not Evidence an Unqualified Codification of Pre-Code Practice

Notwithstanding the uniform characterization of Section 506(c) in both the Congressional Committee Reports and in the Congressional floor debates as a remedy existing in favor of the "trustee" and "debtor in possession," Hartford insists that the legislative history to Section 506(c) evidences an intent on the part of Congress to codify all aspects of pre-Code practice which, according to Hartford, included permitting third party claimants to pursue independent surcharge claims. Looking to the

actual text of the legislative history, however, it is apparent that there is no support for this position.

The only pasages of legislative history cited by Hartford which contain any reference to a "codification" of pre-Code practice are those set forth in the House and Senate Judiciary Committee Reports.[13] In neither of these Reports, however, is Section 506(c) described as an unqualified codification of all aspects of pre-Code practice. Instead, the Reports provide that "Subsection (c) . . . codifies current law *by permitting the trustee to recover* from property [the value of which is] greater than the sums of the claims secured by a lien on that property, the reasonable, necessary costs and expenses of preserving, or disposing of, the property." S. Rep. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854 (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis added).

Thus, far from manifesting a wholesale incorporation of pre-Code practice, the Committee Reports merely: (i) acknowledge the fact that under pre-Code practice, a trustee could recover surcharge claims; and (ii) confirm that this particular aspect of pre-Code practice was being codified in Section 506(c). Neither Report embraces or even acknowledges any other aspects of pre-

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[13] Hartford also refers to the citation of *Textile Banking Company v. Widener*, 265 F.2d 446 (4th Cir. 1959) in the "Table of Derivations"—which was an unofficial table prepared by the staff of the House Judiciary Committee's Subcommittee on Civil and Constitutional Right for the purpose of comparing the House Bill with the Bankruptcy Act then in effect. *See* K. Klee, *Legislative History of the New Bankruptcy Code*, 54 Am. Bankr. L. J. 275, 282 (1980). As Hartford appears to acknowledge, however, the *Widener* case involved a surcharge claim asserted by a trustee and, thus, merely further substantiates that Congress intended Section 506(c) to create a right of recovery in favor of the trustee and not individual claimants.

Code practice. Most significantly, the Reports contain no mention whatsoever of the alleged pre-Code practice whereby third parties were purportedly permitted to recover individual surcharge claims. Thus, for instance, the Reports do not state that "Section (c) codifies current law by permitting the trustee and *third party claimants* to recover . . ." Indeed, as the Reports lack any reference to third party claimants, the only inference that should properly be drawn is that to the extent that Congress was aware of and believed there to be a pre-Code practice whereby third party claimants could bring independent surcharge claims, it did not intend for that practice to be codified in Section 506(c)—a point which, of course, is borne out not only by the clear and unambiguous language of the statute, but also by the legislative history's repeated and exclusive reference to the trustee and the debtor in possession as the proper parties to bring surcharge claims.

III. HARTFORD IMPROPERLY SEEKS TO ELEVATE PRE-CODE PRACTICE ABOVE THE BANKRUPTCY CODE'S CLEAR AND UNAMBIGUOUS LANGUAGE

Hartford further maintains that under the prior holdings of this Court, the practice of surcharging a secured creditor's collateral as it existed under pre-Code law must be recognized and given full effect. In advancing this contention, it is respectfully submitted that Hartford mischaracterizes the previous decisions of the Court.

Indeed, Hartford appears to read the Court's bankruptcy jurisprudence as establishing the following four step procedure for construing and applying federal bankruptcy law: (1) disregard the Bankruptcy Code's plain and unambiguous terms; (2) determine what the practice was prior to the adoption of the Bankruptcy Code; (3) look at the legislative history to the Bankruptcy Code Section involved; and (4) if the legislative history does not contain an affirmative statement expressly disavowing a particular pre-Code practice (or, perhaps, even if it does), the pre-Code practice should be recognized and treated as prevailing law. *See Brief for Petitioner*, pp. 14-20. This Court has never previously adhered to nor condoned such an approach or methodology.

On the contrary, this Court has repeatedly recognized that the Bankruptcy Code was designed to effectuate fundamental and wide-sweeping changes in the bankruptcy laws. *Union Bank v. Wolas*, 502 U.S. 151, 155, 112 S.Ct. 527, 530 (1991) (Pursuant to enactment of Bankruptcy Code in 1978, "Congress overhauled the Nation's bankruptcy laws."); *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 53, 102 S.Ct. 2858, 2862 (1982) (plurality opinion) ("The Bankruptcy Act of 1978 made significant changes in both the substantive and procedural law of bankruptcy."). As the Court observed in *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989) (citations omitted), "Congress worked on the formulation of the [Bankruptcy] Code for nearly a decade. It was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy."

In keeping with its recognition of the extensive efforts undertaken by Congress to reformulate and modernize the bankruptcy laws, this Court has consistently refused to allow pre-Code law and/or practice to override or otherwise alter the Bankruptcy Code's plain meaning. *See, e.g., BFP v. Resolution Trust Corporation*, 511 U.S. 531, 545, 114 S.Ct. 1757, 1765 (1994) ("where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior law."); *Wolas*, 502 U.S. at 158-9, 112 S.Ct. at 531-2 (refusing to allow pre-Code law to alter plain and unambiguous terms of Bankruptcy Code Section 547(c)(2)'s "ordinary course

exception"); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 561, 110 S.Ct. 2126, 2132 (1990) (refusing to allow pre-Code rule excepting criminal restitution obligations from discharge to alter the Bankruptcy Code's plain and unambiguous definition of the term "debt"); *Ron Pair Enterprises*, 489 U.S. at 243-4, 109 S.Ct. 1026, 1031-2 (refusing to allow pre-Code law to alter Bankruptcy Code Section 506(b)'s plain and unambiguous provision for the recovery of post-petition interest by nonconsensual lien holders).

Indeed, to the extent that this Court has looked to pre-Code law as an interpretative aid, it has done so only after finding the relevant provision(s) of the Bankruptcy Code to be ambiguous or silent on the particular question or controversy before the Court. *See, e.g., Dewnsup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 779 (1992) (considering pre-Code law after determining that the provisions of Bankruptcy Code Section 506(d) are ambiguous on the issue of "lien stripping"); *Kelly v. Robinson*, 479 U.S. 36, 50, 107 S.Ct. 353, 361 (1986) (considering pre-Code law after determining that provisions of Bankruptcy Code Section 523(a)(7) are "subject to interpretation.").

Of course, in the matter at hand, the relevant statutory provision is neither silent nor ambiguous but, instead, explicitly and unmistakably provides that it is the trustee, as representative of the estate, who is to pursue surcharge recoveries under Section 506(c). Thus, consideration of pre-Code law and practice is neither necessary nor appropriate. *Cf. Ron Pair Enterprises*, 489 U.S. at 241, 109 S.Ct. at 1029 ("The language before us expresses Congress' intent . . . with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.").

Moreover, it is important to recognize that even in those rare instances in which the Bankruptcy Code has been found ambiguous or silent and, thus, it has been appropriate to consider pre-Code practice, the Court has been reluctant to be guided by pre-Code practice unless it embodies a thoroughly tested and firmly established rule of law. Thus, for instance, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 504, 106 S.Ct. 755, 760 (1986), the Court concluded that it was appropriate to recognize certain pre-Code exceptions to the trustee's abandonment power only after noting that under pre-Code practice, "the exceptions to the judicially created abandonment power were firmly established." *See also Kelly*, 479 U.S. at 46, 107 S.Ct. at 359 (giving weight to pre-Code rule of excepting criminal restitution obligations from discharge after observing that the pre-Code rule was "widely accepted" and "established").

On the other hand, in those circumstances in which the pre-Code practice did not evidence a well-established and firmly entrenched rule, the Court has rejected it as a meaningful interpretative aid. Thus, for example, in *Ron Pair Enterprises*, 489 U.S. at 246, 109 S.Ct. at 1033, the Court—after noting that pre-Code practice was irrelevant because the statute was clear and unambiguous—went on to note that even if pre-Code practice were considered, it could not be given any weight because it "was recognized by only a few courts and often dependent on particular circumstances." Accordingly, the Court concluded that "it was not the type of 'rule' that we assume Congress was aware of when enacting the Code; nor was it of such significance that Congress would have taken steps other than enacting statutory language to the contrary." *Id.*; *see also Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 119 S.Ct. 1411, 1425 (Thomas, J., concurring)

(rejecting relevance of pre-Code acceptance of "new value exception" on grounds that the exception had only been recognized by the Court in *dicta*).

In the instant case, it is evident that to the extent that third-party claimants were allowed to pursue individual surcharge recoveries under pre-Code practice, they did not do so pursuant to a thoroughly tested and well-established rule of law. Indeed, few, if any, aspects of pre-Code surcharge practice were "well-established." As one commentator at the time observed, "hardly any phase of the bankruptcy law has been plagued with so many inconsistent generalities, irreconcilable rules and principles, disagreements between circuits and even within circuits (apparently without any awareness thereof) and loose, indiscriminate statement of rules and citations of authority." 4B *Collier on Bankruptcy*, ¶ 70 at 1224 (14th Ed. 1978).

Nonetheless, it is clear that "[i]n most [pre-Code] cases, the trustee or receiver petitioned the court directly to recover costs from the lienor's interest." J. Toth, *Rehabilitating Bankruptcy Code Section 506(c): Should Third Party Claimants Have Independent Standing?*, 16 W. New. Eng. L. Rev. 1, 11 (1994). Indeed, this point appears to be substantiated by the only pre-Code case cited in the legislative history to Section 506(c)—*Textile Banking Company v. Widener*, 265 F.2d 446 (4th Cir. 1959)—wherein it was the trustee (and not a third party claimant) who sought and obtained the surcharge recovery.

Moreover, as Hartford readily acknowledges, on those occasions in which third party claimants were permitted to obtain surcharge recoveries, the focus was not on whether such claimants were the proper parties to obtain such recoveries but, rather, "on the equitable grounds for allowing the charge against the collateral." *Brief for Petitioner*, p. 25, n.18. Thus, the question of whether third party claimants were the appropriate parties to obtain

such recoveries was not one that was ever vigorously or thoroughly tested.

Under these circumstances, it appears that even if it were appropriate to consider pre-Code practice (which, for the reasons set forth above, it is not), the pre-Code practice pertaining to the recovery of surcharge claims would not serve as a meaningful interpretative aid. *See* Toth, at 12 (pre-Code practice "offers little guidance in evaluating the merits of granting, or denying, third party standing to section 506(c) claimants."). Specifically, to the extent that pre-Code practice allowed for the recovery of surcharge claims by individual claimants, it hardly constituted "the type of 'rule' that we assume Congress was aware of when enacting the Code; nor was it of such significance that Congress would have taken steps other than enacting statutory language to the contrary." *Ron Pair Enterprises*, 489 U.S. at 246, 109 S.Ct. at 1033.

Also, it must be remembered that the pre-Code law and practice pertaining to surcharge recoveries and secured claims in general developed under a fundamentally different legal framework—a framework that lacked much of the sophistication, detail and intricacy of the modern Bankruptcy Code. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965 (wherein the House Judiciary Committee, in advocating the adoption of Bankruptcy Code, described pre-Code bankruptcy law as a system that was designed in "the horse and buggy era of consumer and commercial finance" and that had not been "overhauled . . . in nearly 40 years").

Indeed, as this Court previously has acknowledged, the Bankruptcy Code was designed to modernize bankruptcy law by replacing many of the indefinite and outdated principles and practices that existed under earlier bankruptcy law with a more comprehensive and structured

system. This was especially true with respect to the treatment of secured claims. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026 (*quoting* legislative history) ("In particular, Congress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.' "). Thus, it is apparent that many of the broad and amorphous pre-Code concepts upon which Hartford seeks to rely have limited relevance to and provide little insight into the structure and operation of the Bankruptcy Code. *Cf. 203 North LaSalle Street Partnership*, 119 S.Ct. 1411, 1425 (Thomas J., concurring) ("The Code's overall scheme often reflects substantial departures from various pre-Code practices . . . Hence it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.").

IV. HARTFORD'S CONTENTION THAT THE DECISION BELOW VIOLATES ESTABLISHED PRINCIPLES OF STANDING IS BASED UPON A FUNDAMENTAL MISUNDERSTANDING OF THE RELEVANCE OF SUCH PRINCIPLES TO THE QUESTION PRESENTLY BEFORE THE COURT

Hartford further insists it is entitled to pursue a private right of recovery under Section 506(c) based upon the established principles of "standing" as recognized and articulated by this Court. While it is true that many courts and commentators have conveniently used the word "standing" when describing the issue of whether third party claimants such as Hartford may surcharge a secured creditor's collateral under Section 506(c), this characterization can be misleading and, ultimately, is technically inaccurate. The issue currently before the Court is not one of standing (in the traditional sense) but rather whether Congress intended for Section 506(c) to provide third party claimants such as Hartford with a right of recovery against secured creditors and/or their

collateral. Thus Hartford is mistaken in attempting to find support for its position in the jurisprudence addressing traditional notions of standing.

As this Court repeatedly has recognized, there is a profound and fundamental distinction between the concepts of standing and whether a party has a right of recovery or remedy under a particular federal statute. *See, e.g., Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1010 (1998) (courts must resolve questions of standing before considering whether plaintiff has a cause of action); *Davis v. Passman*, 442 U.S. 228, 239, n.18, 99 S.Ct. 2264, 2274, n.18 (1979) (distinguishing concepts of "jurisdiction," "standing," "cause of action," and "relief."). Specifically, standing concerns whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364 (1972). Thus, the law of standing requires that a party bringing an action have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2965, 2970 (1985).

In contrast, the question of whether a party has a right of recovery or remedy under a particular federal statute is one of statutory construction pursuant to which the court must determine whether Congress intended to create a remedy in favor of a particular litigant. As this Court stated in *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 532, 109 S.Ct. 1282, 1286 (1989) (citations omitted), the question of whether a party has a private cause of action under a statute "poses an issue of statutory construction . . . Unless such congressional intent can be inferred from

the language of the statute, the statutory structure, or some other source, the essential implication of a private remedy simply does not exist." Thus, "the focus of cause of action inquiry must not be confused with standing—it does not go to the quality or extent of the plaintiff's injury, but to the nature of the right asserted." 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 500 (1984).

Traditional questions of standing most commonly arise in connection with "challenges to government conduct, where the litigants often lack the obvious stake normally present in most lawsuits between private parties[.]" L. Tribe, *American Constitutional Law*, § 3-14 at 104 (2nd Ed. 1988). As one noted scholar observed, "[t]he law of standing is almost exclusively concerned with such public-law questions as determinations of constitutionality and review of administrative or other governmental action." C. Wright, *Law of Federal Courts*, § 13 at 68 (5th Ed. 1994). Thus, in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975), a case heavily relied upon by Hartford in its attack on the *en banc* Circuit decision below, the Court considered whether a citizens group and certain residents of Rochester, New York, had standing to challenge a neighboring town's zoning ordinances under the "privileges and immunities" clause. *See also Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997) (another case relied upon by Hartford, wherein the Court considered whether a group of ranchers and irrigation districts had standing to challenge certain actions taken by the U.S. Secretary of the Interior and certain members of the Federal Fish and Wildlife Service); *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315 (1984) (wherein the Court considered whether the parents of African-American children attending public school had standing to challenge the Internal Revenue Service's alleged failure to adopt sufficient procedures to deny tax-exempt status to racially discriminatory private schools); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970) (wherein the Court addressed the issue of whether certain data processing companies had standing to challenge certain rulings by the Comptroller of Currency).[16]

On the other hand, when an action is between private parties and—like the present case—essentially involves a demand for monetary relief, the question of standing is rarely at issue. There normally is no question that the plaintiff would have a sufficient stake in the outcome of the action to insure that a justiciable controversy is properly presented to the court. *See* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3531.6 at 496 (1984) ("Ordinarily there is no question as to the standing of a plaintiff who claims a personal right to a damages remedy.").

In the case at bar, the issue before the Court is not whether Hartford has standing to pursue a private right of recovery under Section 506(c).[17] Instead, the issue in this case is whether Hartford has a private right of recovery

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[16] In its "standing" argument, Hartford also cites to *Meyer v. Fleming*, 327 U.S. 161, 66 S.Ct. 382 (1946), a case in which the Court held that the principal of a corporation could continue to assert a derivative claim on behalf of the corporation notwithstanding the corporation's bankruptcy filing. Aside from having no factual similarity to the instant matter, it is clear that this case does not address (even by way of analogy) the central question of when a party can pursue a right of recovery expresssly created in favor of another party.

[17] Traditional notions of standing might be implicated if Hartford were proposing to pursue a surcharge recovery on behalf of the bankruptcy estate, for in such circumstances there might be some question as to whether Hartford's interest as a pro-rata beneficiary of any amounts recovered would constitute a sufficient "stake in the outcome" to insure that Hartford would vigorously pursue the claim. From the inception of this matter, however, Hartford has made clear that it seeks to surcharge Union Planter's collateral solely and exclusively for its own benefit.

under Section 506(c), that is, notwithstanding the fact that by its express terms, the statute only creates a remedy in favor of the trustee as the representative of the bankruptcy estate.

In concluding that Hartford does not have such a right of recovery, the court below reached a result that is in complete harmony with the plain meaning of the statute and the prevailing precedents of this Court. *See, e.g., National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies . . .").

CONCLUSION

For all the above stated reasons, Respondent Union Planters Bank, N.A. respectfully submits that the decision of the Eighth Circuit Court of Appeals, en banc, should be affirmed.

Respectfully submitted,

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